DOCUMENT RESUME

ED 156 725 95 TM 007 591

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TITLE The Legal Implications of Statewide Pupil Performance Standards.
INSTITUTION Central Midwestern Regional Educational Lab., St. Ann, Mo.
SPONS AGENCY Education Commission of the States, Denver, Colo. Handicapped Children's Education Project.; National Inst. of Education (DHEW), Washington, D.C.
PUB DATE Sep 77
NOTE 44p.; For related documents, see TM 007 584 and 597 ; A Background Paper Prepared for the Minimal Competency Workshops Sponsored by the Education Commission of the States and the National Institute of Education.
AVAILABLE FROM Education Commission of the States, Suite 300, 1860 Lincoln Street, Denver, Colorado 80295 ($2.75)

EDRS PRICE MF-$0.83 HC-$2.06 Plus Postage.
DESCRIPTORS Academic Achievement; *Academic Standards; Basic Skills; *Constitutional Law; *Court Litigation; Educational Accountability; Educational Assessment; Elementary Secondary Education; Equal Education; Functional Illiteracy; Government School Relationship; Graduation Requirements; Legal Problems; *Legal Responsibility; Literature Reviews; Mastery Tests; Performance Based Education; *School Responsibility; State Legislation; State Programs; *State Standards; Student Certification; Testing Programs
IDENTIFIERS *Minimum Competency Testing

ABSTRACT

About half the states in the U.S., either by legislative or administrative action, have moved toward the imposition of statewide performance standards in their elementary and secondary schools. Typically these standards pertain to the basic skills--reading, mathematical computation, and written and oral expression. Almost all of these programs have been instituted since 1974. Students and their parents will be the primary parties with interest in challinging the existence and implementation, or the non-existence, of performance standards. Judicial decisions suggest that the courts may not be favorably disposed to challenges to the exercise of discretion by school authorities. Plaintiffs challenging the existence and implementation of minimum pupil performance standards are most likely to base their legal arguments on the equal protection and due process clauses of the federal and state constitutions, education clauses of state constitutions, general statutory provisions, and common law negligence theories. Plaintiffs are likely to be confronted with a heavy burden of persuasion. Either the per se illegality or the specifics of existing programs may be challenged. The concept of equal educational opportunity has many definitions. Some relate to pupil performance, while others relate to the opportunity to be exposed to certain educational services. A number of court decisions are discussed. (CTM)

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The Legal Implications of Statewide Pupil Preformance Standards

by

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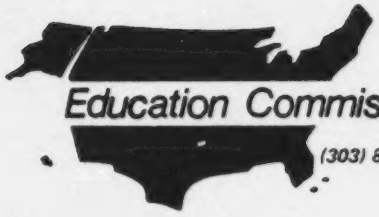
A background paper prepared for the Minimal Competency Workshops sponsored by the Education Commission of the States and the National Institute of Education.

TM007 591

September, 1977



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Prepared by CEMREL, Inc., a private nonprofit corporation supported in part as an educational laboratory by funds from the National Institute of Education, Department of Health, Education and Welfare. The opinions expressed in this publication do not necessarily reflect the position or policy of the National Institute of Education or the Education Commission of the States, and no official endorsement should be inferred.

THE LEGAL IMPLICATIONS OF STATEWIDE PUPIL PERFORMANCE STANDARDS

Introduction

During the past several years about half the states, by legislative or administrative action, have moved toward the imposition of statewide pupil performance standards in their elementary and secondary schools. Indeed, bills have been introduced in the Congress to make the trend national in scope. The major impetus for this striking development appears to be concern about low levels of pupil performance in the basic skills.* The spectre of "functional illiteracy" of as many as 50 percent of high school graduates has been raised, thereby calling into sharp question the worth of many high school diplomas. The primary sources of the concern have been those institutions which have traditionally relied upon the secondary schools to provide graduates capable of functioning at respectable levels in the basic skills -- colleges and universities, and the business community. Many parents, too, have expressed their concern and dismay about the apparent failure of the public schools to ensure that many students reach reasonable levels of proficiency in the basic skills. Some have initiated "educational malpractice" lawsuits on behalf of their low-performing children.

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*Typically these have included reading, mathematical computation and written and oral expression.

As with many sweeping educational reforms, there is reason to believe that movement toward the imposition of minimum pupil performance standards in some states has occurred with little attention to the implications of such a development. This is not to suggest, however, either that the imposition of such standards is undesirable or that extended study should be substituted for informed action. It is to suggest that the reform is more likely to succeed if it is based upon sufficient consideration of the needs to be addressed, the alternative responses available, and the strengths and weaknesses of each.

This paper will explore the legal implications of statewide pupil performance standards. After briefly setting forth the historical context, the paper will treat various constitutional, statutory and common law theories supporting challenges to standards already adopted or likely to be adopted by the states. These challenges may assert that the standards are illegal per se or as implemented. Then, the paper will explore, especially in the context of states which have taken little or no action toward adoption of minimum performance standards, arguments that the establishment of such standards is legally required. Finally, the paper will make some suggestions about the future legal course of statewide pupil performance standards.

The Historical Context

As recently as 1974, there was virtually no evaluation of pupil performance against established statewide standards for purposes of either promotion from grade to grade or high school graduation. According to a study prepared for the National

Institute of Education,* only six states had substantive promotion requirements and only one of them, Virginia, required passing a standardized test. The others required findings such as that the student had "satisfactorily" completed the prior grade, or had progressed "within the limits of his ability." The only other statewide promotional standard, in use in four states then, was a requirement that the student have attended school a certain minimum number of days during the school year. (Of course, students are obliged by compulsory education laws to attend school regularly.)

High school graduation requirements, in the vast bulk of the states, focussed in 1974 on total credits, defined in time units, accumulated by a student. In some states, successful completion of statutorily required courses, such as those dealing with the United States or state constitution, citizenship or patriotism, was also a prerequisite to graduation. Five states provided for some form of standardized test, but only three of those seemed to require passage of the test for graduation. In New York, passage of the Regents' examination results in the award of a more prestigious diploma.

The "accountability" of school districts and of the state system itself similarly has been defined largely in terms of inputs. State education codes have contained extensive requirements about such matters as curriculum offerings, guidance and counselling programs, school buildings, libraries, pupil-

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*Lawyers' Committee for Civil Rights Under Law, A Study of State Legal Standards for the Provision of Public Education (NIE, 1974).

teacher ratios, pupil transportation, safety and health, school calendar, and teacher personnel policies. In general, the pre-1975 attention to pupil outcomes at the state level has been limited to general provisions -- some state laws regarding the evaluation of student performance, and to more specific provisions authorizing or requiring a statewide assessment program. These have typically consisted of standardized tests administered at various grade levels to all or a sample of students throughout the state. Information about the results has been disseminated to local school districts for their use in analyzing and responding to educational needs. The role of state education authorities at this stage usually has been limited to the provision of technical assistance.

Pupil performance standards have not been entirely ignored, however. In a considerable number of states local school districts have had discretion to impose their own performance standards and some, such as Denver, have taken full advantage of that discretion. Even absent formal standards, for decades local districts have used their own standardized tests, in addition to any required by the state, to assess pupil performance. Moreover, successful course completion should signify academic performance at a level deemed satisfactory by the school district, school or individual teacher. These various performance standards and assessment procedures imposed by local districts are not the focus of this paper; its concern is statewide minimum pupil performance standards. Yet the experience of local districts in this area surely is relevant to recent statewide developments.

Since 1975 there has been a high level of activity in most states regarding the establishment of statewide pupil performance standards for grade promotion or high school graduation. At the latest count,* all but about a half dozen states are implementing, developing or planning programs involving minimum pupil performance standards, or have such programs under study. A brief overview of the programs will be useful in completing the historical context from which this paper will address the relevant legal issues. More detailed state-by-state information is available from the sources cited in the footnote below.

About 25 states are committed by legislative or administrative action to the implementation of minimum pupil competency standards. Two other states have tentative programs which are being further defined. The remaining states are either planning programs or have the general subject under study. This past summer two more states adopted legislation mandating statewide establishment and assessment of basic skills competency levels.

Of the states already committed to programs, slightly less than half are by statute and slightly more than half by administrative rule, regulation or resolution. The stated purposes of the various programs are to assure minimum performance levels, to impose high school graduation requirements, to assist in re-structuring curriculum or to identify pupils

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*See Education Commission of the States, Update VI: Minimal Competency Testing (June 1, 1977), as further updated by Education Commission of the States, Legislative Review, v.7, n.8 (September 6, 1977), at p. 1. See also Noonan & Rubin, Statewide Minimum Pupil Proficiency Standards: A Survey of the States (an unpublished study done under NIE Grant c-76-10105, July 10, 1977).

in need of special instructional assistance. Generally, they cover the "basic skills" -- variously defined but usually consisting of one or more of the following: reading, computation, and oral and written communication. In somewhat more than half of the states committed to programs there are explicit requirements of periodic standardized testing of pupils, usually starting with either grades three to five or with grade nine. Satisfactory performance is variously defined as "mastery," "passing" the test (in New York and New Jersey, for example, this means achieving 65 percent correct answers), or performance at a certain "grade level." In most states, the state education authorities establish the performance standards; (although local districts may be force to demand more of students) in all but one of the several states where local districts establish the standards, the state education authorities develop the testing instruments and provide technical assistance to the districts. About half the states require remedial instruction for students who fail to demonstrate satisfactory performance and many of these states provide students with multiple chances to succeed. More than half the states do not specify a consequence for ultimate failure to meet the standards. In those states which do not impose a sanction, about half provide for the withholding of the high school diploma and about half provide for the issuance of a differential diploma (sometimes a certificate of attendance" rather than a diploma).

An Analysis of the Legal Implications

As the brief description of current minimum pupil performance

programs suggests, their primary impact is on students and whether they should be promoted, receive remedial assistance, be graduated, or be graduated with an inferior diploma. Certainly, evidence that substantial numbers of students in particular districts are performing at unaceeptably low levels may give rise to very real pressures on local school systems and their personnel. But that is an indirect and unofficial consequence under most state programs. In only one or two states is pupil performance against statewide standards likely to be a measure of the funding made available to local districts or accreditation by the state education authorities. A more frequent but far from universal occurrence may be the use of pupil performance results to measure the competency of individual teachers and administrators.*

By and large, therefore, students and their parents (and perhaps teachers and administrators on their own behalfs) will be the primary parties in interest with legal standing to challenge the existence and implementation, or non-existence, of performance standards. This paper will briefly describe and assess the more plausible theories they may rely upon in legal challenges regarding such standards.

Although to this point there have been no such challenges, some litigation of the past four or five years may be relevant to performance standards. An important, common thread of these judicial decisions is the extent of the deference to be accorded

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*In Scheelhaase v. Woodbury Central Community School District, 488 F.2d 237 a school district's dismissal of a teacher, based in part on her students' poor performance on standardized tests, was sustained. (8th Cir. 1973, cert. denied, 417 U.S. 969 (1973).

school authorities; conduct in the areas of pupil testing and the determination of acceptable levels of pupil performance.

In 1973, the New Jersey Education Association, joined by parents of public school children, sought to prevent dissemination of the results of the New Jersey Educational Assessment Program, a statewide pupil performance evaluation system initiated in November 1972.* They charged that dissemination

> will violate their constitutional, statutory and common-law rights, will cause polarization within the school communities, racial conflict, degrading stigmatization, illegal tracking classifications, interference with the right to an equal free public education, the right to earn a livelihood, deny them due process, subject them to unfair accountability proceedings, invade their right of privacy, and delay and defeat the education goals allegedly sought to be achieved by and through these tests.**

The case was remanded to the Commissioner of Education for an administrative hearing, and the Commissioner ruled that since the state assessment program was "an important component of the content of an educational program" and was "valid, useful and reliable" the results should be released.*** The Commissioner's decision was affirmed by the State Board of Education.****

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*Chappell v. Commissioner of Education of New Jersey, 135 N.J. Super. 565, 343 A.2d 811 (App. Div. of 1975), certif. denied, 69 N.J. 84 (1975).

**135 N.J. Super. at 568-69.

***1973 New Jersey School Law Decisions 539 (Comm'r of Educ.)

****1973 New Jersey School Law Decisions 575 (State Board of Educ.) The Commissioner and State Board of Education ruled similarly on an attempt by the same challengers to have dissemination of the following year's test results enjoined. 1974 New Jersey School Law Decisions 736 (Comm'r of Educ.), aff'd, 1974 New Jersey School Law Decisions 1375 (State Board of Educ.).

After unsuccessful efforts before the state's lower appellate and supreme courts and before the United States Supreme Court to have the release of the results stayed, the plaintiffs pursued the case in the state courts. A three-judge panel of the state's appellate division unanimously rejected the challenge, finding the Commissioner and State Board of Education clearly to have acted properly in an area within their statutory authority. The initiation of the testing program and dissemination of the results were deemed to be "clearly matters of fundamental educational policy."*

In the Peter W. case (originally called Peter Doe),** a high school graduate of the San Francisco public school system filed the first "educational malpractice" suit in 1972. He sought to have the California courts attribute his low level of performance in the basic skills to the negligence, and other legal defaults, of the educational authorities. To dramatize his complaint, Peter originally had sought $1 million in damages from the defendants -- the school system, its superintendent and its governing board. Both the novelty of the accountability theory advanced and the extraordinarily broad public policy and fiscal implications of permitting a low-achieving student to recover money damages from public school authorities contributed to plaintiff's failure to prevail. Although the California Court of Appeal was required by the

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*135 N.J. Super. at 572.

**Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (Ct. App. 1976).

procedural posture of the case to assume the truth of all the plaintiff's factual allegations, nonetheless it concluded that the plaintiff had failed to demonstrate that the school authorities had a legal "duty of care" to students, the breach of which could result in liability. The court based this conclusion largely on its perception of the relevant public policy considerations. Said the court:

> ...[C]lassroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might -- and commonly does -- have his own emphatic views on the subject. The "injury" claimed here is plaintiff's inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers.*

Beyond these policy concerns, the court was influenced by the existing social and financial problems besetting the public schools. To find liability in cases such as the one before it, "would burden [the public schools] -- and society -- beyond calculation."** Thus, the Court of Appeal sustained the lower court's dismissal of plaintiff's complaint, clearly enhancing

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*60 Cal. App. 3d at 824, 131 Cal. Rptr. at 860-61.

**60 Cal. App. 3d at 825, 131 Cal. Rptr. at 861.

the discretion of education authorities as to the performance levels of their students and insulating them from negligence challenges based upon low achievement levels.

The latest and strongest judicial statement about the discretion to be accorded school authorities in the area of pupil performance and its measurement is the New York Court of Appeals' recent decision in James v. Board of Education of New York City.* In that case, parents and students sought to prevent the administration of citywide reading tests because, allegedly, the questions had been improperly provided to some students. After investigating the situation, the New York City Board of Education had concluded that the test should be administered. New York State's highest court, the Court of Appeals, resoundingly vindicated the Board's exercise of discretion, ruling that the lower courts were "without authority to set aside, even temporarily, a policy decision by school administrators with respect to the integrity of a school examination."** Recognizing the implicit requirement that the reading test be administered fairly, the court rejected a judicial role in this determination. It was the responsibility of the Chancellor (New York City's equivalent of a superintendent) and ultimately of the state Commissioner of Education to determine whether a particular test met the legal requirements.

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*Civ. No. 482 (Ct. App., July 14, 1977).

**Slip op. at 7.

The restrictive role of courts specified in this case may foreshadow judicial reluctance to involve the courts in challenges regarding minimum pupil performance standards. Arguably, the conclusion in James that it would be impossible for a court to supervise improved test acquisition and administration procedures applies at least as forcefully to judicial supervision of a statewide minimum pupil performance program.

Although there are few reported judicial opinions involving challenges to pupil promotion or class assignment decisions (and most of those date back more than 60 years), the limited case law further supports the deference accorded school professionals. The general rule is that so long as the school board acts in good faith it may establish and implement standards for the promotion of students from one grade to another.*

Thus, judicial decisions, which bear at least indirectly on minimum pupil performance standards, and others of more general import, suggest that the courts may not be favorably disposed to challenges to the exercise of discretion by school authorities. This tendency will shape, to a significant degree, the context within which legal actions relating to minimum pupil performance standards will be decided. Challenges to legislatively or administratively ordained pupil performance standards, discussed in the following section of the paper, will have to overcome a substantial presumption of validity -- another way to state such judicial

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*See, e.g., Barnard v. Inhabitants of Shelburne, 216 Mass. 19, 102 N.E. 1095 (1913).

deference. Conversely legal challenges to the failure of states to adopt pupil performance standards may have a similar burden, especially if the state has consciously rejected, on educational policy grounds, the imposition of such standards.

A final point should be made -- since there are no direct precedents involving legal challenges to the existence or absence of minimum pupil performance standards the discussion of possible challenges will have to proceed by analogy to other judicial decisions. Reliance on the conclusions drawn by this paper must, of necessity, be tentative. Moreover, the strength or weakness of the legal theories will vary, to a considerable extent, from state to state based on the particulars of each program and on relevant legal precedents. There is no substitute for a detailed analysis of the law in a particular state. The purpose of this paper is not to provide definitive answers about the legality of particular programs but, rather, to suggest the questions which must be dealt with and a framework for such further analysis.

1. Legal Challenges to Existing Minimum Pupil Performance Programs. Plaintiffs challenging the existence and implementation of minimum pupil performance standards are most likely to base their legal arguments on the equal protection and due process clauses of the Federal and state constitutions, education clauses of state constitutions, general statutory provisions defining the powers and duties of state education authorities, and common law negligence theories. No matter what their legal theories, plaintiffs are likely to be confronted with a heavy

burden of persuasion. As indicated, judges will surely be attracted by the argument that they should not second guess the educational judgments of the "experts," even if those judgments may be imperfect or subject to question. To meet this argument, plaintiffs will have to demonstrate the irrationality of the action in question, or that it trenches upon a clear legal right of the plaintiffs without sufficient justification.

a. Challenges to Per Se Illegality. To support the argument that the imposition of pupil performance standards is per se unlawful plaintiffs would have to demonstrate that there is a legal defect inherent in any system of pupil performance standards. The most likely bases of such an assertion are the equal protection and due process clauses of the Federal and state constitutions, and the education clauses of some state constitutions.

Under all these provisons, however, there is a threshold problem. Arguments of per se illegality must proceed on a level of considerable generality because they attack pupil performance standards as being inherently defective. Yet, given the judiciary's previously noted deference to education decisionmakers as well as its traditional respect for legislative decisions it is likely to take very particularized evidence of violations of plaintiffs' rights to influence a judge. Thus, by definition, attacks on per se illegality are less likely to succeed. Beyond that threshold difficulty, each of the theoretical bases has other deficiencies.

Under equal protection doctrine, plaintiffs would have to

argue either that minimum pupil performance standards programs are inherently biased along racial and ethnic lines, or that such programs effectively classify students by ability and that such classification is per se unlawful. The recent pronouncements of the United States Supreme Court will weaken plaintiffs' first argument. In Washington v. Davis,* the Court ruled that evidence that governmental action had a racially disproportionate effect was insufficient to prove a violation of the Equal Protection Clause. Plaintiffs would be required to prove an invidious purpose. Although the Court recognized that such a purpose might be inferred from evidence of a disproportionate impact, among other things, it appeared to demand at least somewhat more of the challengers than previous opinions had.** Moreover, in subsequent decisions the Court indicated that, even if there were proof of invidious purpose, the plaintiffs would have to prove also that the same result could not have occurred had the governmental officials been benignly motivated.*** These decisions clearly compound

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*426 U.S. 229 (1976).

**In Village of Arlington Heights v. Metropolitan Housing Development Corp., _____ U.S. _____, 97 S. Ct. 555 (1977); the Court provided guidance about the factors which a court will consider in inferring discriminatory intent: (1) the historical background of the decision; (2) the specific sequence of events leading up to the challenged decision; (3) departures from the normal procedural sequence or substantive results; and (4) the legislative or administrative history.

***Village of Arlington Heights, supra; Mt. Healthy City School Dist. Board of Educ. v. Doyle, ____U.S._____, 97 S. Ct. 568 (1977).

plaintiffs' proof problems and make it especially difficult for challengers of minimum pupil performance standards on grounds of racial or ethnic bias to prevail in a challenge based upon per se illegality.

Plaintiffs' difficulties may be even greater in attacking performance standards based upon their "classification" effects. Courts have made clear that ability grouping is not per se unlawful.* Even in school districts under court order to desegregate, where ability grouping had the effect of dividing students along racial lines, some federal courts have refused to strike down the practice.**

Due process theories for per se illegality, based on an unjustifiable deprivation of a liberty or property interest are unlikely to meet with any greater success. The most probable liberty interest to be asserted is freedom from stigmatization. The act of imposing minimum performance standards, so the argument would proceed, inevitably stigmatizes those who fail to meet the standards. Even assuming this to be true, not every stigmatization violates the constitution. Rather, under

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*See, Smuck v. Hobson, 408 F.2d 175, 189 (D.C. Cir. 1969) (tracking system as it existed at time of lower court decree can be abolished but ability grouping can be reinstated in some other form). See also note, Equal Protection and Intelligence Classifications, 26 Stan. L. Rev. 647 (1974).

**E.g., Copeland v. School Board of City of Portsmouth, 464 F.2d 932 (4th Cir. 1972). But see Lemon v. Bossier Parish School Board, 444 F.2d 1400 (5th Cir. 1971); Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211 (5th Cir. 1969), rev'd in part on other grounds, 396 U.S. 290 (1970) (invalidating previously segregated schools' attempts to avoid the impact of desegregation by assigning students to schools on the basis of test scores.)

recent U.S. Supreme Court pronouncements it is the "alteration of legal status which combined with the injury from the defamation justified the invocation of procedural safeguards."* To sustain a per se challenge on the basis of stigmatization, therefore, plaintiffs apparently would have to establish that any classification based upon minimum performance standards effected a change in their "legal status" and defamed their characters.

In pressing a property interest as the basis for a due process challenge, plaintiffs would be most likely to argue that the right to an appropriate education, or the right to receive a high school diploma, is such an interest. There is some judicial support for the first proposition.** The difficulty will be in demonstrating the inherent incompatibility between a minimum pupil performance standards program and that interest. Indeed, the converse could perhaps be more forcefully asserted -- that determination of a student's performance level is necessary, or at least desirable, for the formulation of an appropriate educational program.*** Plaintiffs who argue that conditioning their receipt of a high school diploma on attainment of certain

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*Paul v. Davis, 424 U.S. 693, 709 (197). The Paul opinion reduces due process protections against stigmatization which had been available since Wisconsin v. Constantineau, 400 U.S. 433 (1971).

**See, e.g., Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972) (right of handicapped children to appropriate education); Robinson v. Cahill, 62 N.J. 473, 303 A 2d 273 (1973) (constitutional guarantee must be understood to embrace that educational opportunity which is needed to equip a child for her or his role as a citizen and as a competitor in the labor market); Horton v. Meskill _____Conn._____, 376 A.2d 359 (1977) (education is a fundamental right and any infringement of that right must be subject to strict judicial scrutiny)

***See discussion in text, infra.

skills measured by a standardized test is a per se violation of their property rights may have a stronger argument. Pupils who have attended class regularly and performed acceptably in all other academic respects can maintain that they have fully discharged their responsibilities in the educational process. The success of this argument will depend upon the court's willingness to find that students have thereby become entitled to a high school diploma, barring school authorities from imposing additional requirements.

Finally, a charge of per se illegality might be advanced on the basis of a state constitutional education clause. Some clauses obligate the state to provide a certain level or kind of education (i.e., "thorough and efficient,"* "high quality,"** or "uniform").*** The challengers would have to demonstrate that: (1) the clause provides students with an enforceable legal right;**** and (2) that right is violated by any minimum performance standards program, either because its emphasis on minimum performance is inconsistent with requirements of "thoroughness" or "high quality,"

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*See, e.g., N.J. Const. art. VIII, §4, ¶1, Ohio Const. Art. VI §2; Pa. Const. art. III, §14. W. Va. Const. art. XII, §1.

**See, e.g., Ill. Const. art. X, §1; Mont. Const. art. X, §1(3); Va. Const. art. VIII, §1.

***See, e.g., Cal. Const. art. IX, §5; Idaho Const. art. IX, §1; Wyo. Const. Art. VII, §1.

****Compare Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973) (state constitution's education clause provided basis for students to challenge denial of equal educational opportunity) with Northshore School District v. Kinnear, 84 Wash. 2d 685, 530 P.2d 178 (1974) (duty to provide for "ample" education is squarely upon the legislature and Superintendent of Public Instruction and not upon the courts).

or because the mandate of a "uniform" system of education precludes the classification of students implicit in a statewide minimum standards program.

b. Challenges to the Specifics of Existing Programs.

Challengers will somewhat improve their prospects if they focus their arguments on the defects of a particular program of minimum pupil performance standards rather than on the per se illegality of all such programs. As indicated, their burden will still be a heavy one; at least, though, they can direct the court's attention to specific alleged injuries resulting from specific elements of the program. They can also compare the allegedly defective aspects of the program with other more acceptable modes of implementing a performance standards program. Thus, the court is not being requested, as in a per se challenge, to issue a blanket denunciation of an educational policy judgment adopted by the state's responsible officials.

The legal bases of challenges to specifics of existing programs will be similar to those discussed in connection with per se challenges -- Federal and state equal protection and due process clauses, and state education clauses. In addition, a common law negligence argument can be mounted.

Under the Federal Equal Protection Clause, plaintiffs' arguments would be addressed primarily to the racially and ethnically discriminatory aspects of the minimum standards program. It is widely assumed that most programs will result in disproportionately greater numbers of Black and Hispanic students failing to meet the standards. If that assumption turns

out to be well-founded as to a particular program, plaintiffs will be able to document a racially or ethnically disproportionate impact. Prior to the U.S. Supreme Court's decision in Washington v. Davis,* that would have been sufficient to make out a prima facie case of unlawful discrimination. The consequence would have been to shift to the state a substantial burden of justifying the program, notwithstanding its racial or ethnic impact. One element of the state's burden of justification would have been for it to demonstrate that there was available no mechanism to achieve its legitimate purposes with less racially or ethnically disproportionate consequences.

Even under such an approach, the state might have been able to justify its program by stressing the diagnostic and remedial aspects. As indicated in the discussion of per se challenges, however, the state's position has been at least somewhat strengthened since Washington v. Davis.** Challengers will have to persuade a court of the state's racially or ethnically discriminatory purpose to be able to prevail. Although purpose can be inferred from circumstantial evidence, including data showing racially or ethnically disproportionate effect, it is highly unlikely that evidence of such effect, except perhaps in the grossest case

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*426 U.S. 229 (1976).

**The full implications of Washington v. Davis are not yet clear. Commentators have disagreed about its import and the Supreme Court has agreed to hear other cases which may result in clarification or amplification of its position. E.g., Regents of the University of California v. Bakke, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1975), cert. granted, 45 U.S.L.W. 3570 (Feb. 22, 1976).

will be sufficient by itself to cause a court to infer an invidious purpose. There will have to be other evidence showing, for example, that the minimum standards program is a vehicle for perpetuating or creating racially or ethnically separate classes or schools, or for totally excluding low-achieving minority students from the schools. If plaintiffs cannot demonstrate sufficient evidence to support an inference of invidious purpose, their challenge will fail. But even if plaintiffs can support such an inference, the state will still have an opportunity to rebut it. If for example, the program has a diagnostic and remedial purpose such that low-achieving students are given more intensive instructional attention and additional funding for remedial assistance without being physically segregated, and if the validity of the assessment instruments can be supported, the state should be able to rebut any inference of invidious purpose, notwithstanding the extent of the racial or ethnic disproportion. Moreover, as previously indicated, even if there were an unrebutted inference of invidious purpose, plaintiffs might further have to prove that the same discriminatory result would not have resulted from a benign purpose.*

During the past few years, several state courts have tended to be more expansive in their interpretation of equal protection than the federal courts.** Thus, plaintiffs in those states might fruitfully pursue challenges under the state constitution's Equal

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*Village of Arlington Heights v. Metropolitan Housing Development Corporation, _____U.S._____97 S. Ct. 555 (1977); Mt. Healthy City School District Board of Education v. Doyle _____U.S. _____, 97 S. Ct. 568 (1977).

**See, e.g., Serrano v. Priest, 18 Cal. App. 3d 728, 557 P.2d 929, 35 Cal. Rptr. 345 (1977); Horton v. Meskill, _____Conn._____, 376 A.2d 359 (1977).

Protection Clause. Such challenges might be based upon two theories: (1) racial or ethnic discrimination; or (2) denial of equal educational opportunity. As to the first theory, some state courts might be willing to adhere to a pre-Washington v. Davis approach to racially or ethnically disproportionate impact, thereby strengthening the challengers' position. As to the second theory, in several states education has been deemed a "fundamental interest"* for purposes of equal protection analysis. Consequently, the state's alleged infringement on equal educational opportunity will be subject to close review. If students who fell below minimum performance standards can show that under a particular program their educational opportunities are diminished by that fact, they may be able to force the state to demonstrate a "compelling state interest" for structuring the program in that way. This state equal protection theory differs from the first in that the class of students is not defined by race or ethnicity but rather by level of academic performance. Of course, low-achieving Black or Hispanic students could advance both theories.

The Federal and state due process clauses also afford some possibilities for challenging specific aspects of minimum pupil performance programs. The initial question will be whether the challengers can establish a sufficient liberty or property interest of which the state's minimum standards program threatens

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*See, e.g., Serrano v. Priest, supra; Buse v. Smith, 74 Wis. 2d 550, 247 N.W. 2d 141 (1976); Shofstall v. Arizona, 110 Ariz. 88, 515 P.2d 590 (1975).

to deprive them. As the discussion of per se challenges indicated, the likeliest liberty interest would be freedom from stigmatization; the likeliest property interest would be the right to an "appropriate" education. There is some judicial support for the sufficiency of each of those interests.* Assuming a sufficient liberty or property interest, the harder questions are (1) whether the particular minimum standards program threatens to "deprive" students of such "liberty" or "property"; and (2) even if so, whether there are adequate due process protections afforded. The theory of due process is not that the state is barred absolutely from depriving citizens of their liberty and property; rather, such deprivation must be accompanied by reasonableness and fair procedures.

The issue of whether a pupil is "stigmatized" by falling below minimum standards is a complex one. The research literature is inconclusive on this point.** The current position of the courts is uncertain.*** The ostensible purpose of a minimum

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*Wisconsin v. Constantineau, 400 U.S. 433 (1971); (where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential). But see Paul v. Davis, 424 U.S. 693 (1976) (reputation alone, apart from some more tangible interests such as employment, is neither "liberty" nor "property" by itself sufficient to invoke the protections of the Due Process Clause); Ingrahan v. Wright, 45 U.S.L.W. 4364 (April 19, 1977) (Due Process Clause of 14th Amendment does not require notice and a hearing prior to the imposition upon students of corporal punishment). For support for the student's property interest, see Goss v. Lopez, 419 U.S. 565 (1975) (suspension of student resulted in denial of property right to attend school conferred by Ohio law on all children). See generally, Board of Regents v. Roth 408, U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593(1972).

**See, e.g., Esposito, Homogeneous and Heterogeneous Ability Grouping: Principal Findings and Implications in Evaluating and Designing More Effective Educational Environments, 43 Rev. of Ed. Research 163-76 (Winter 1973).

***See discussion in note, supra, comparing Wisconsin v. Constantinea with Paul v. Davis.

standards program is not to hold low achieving students up to public ridicule. Yet, particular elements of a program could have that practical effect. If, for example, students were denied high school graduation, or standard diplomas, or promotion, or placement in regular classes, as a consequence of performing below minimum standards, and if these responses were visible and public, stigmatization arguably would have taken place. Whether the stigmatization was justified is another question, to be dealt with subsequently.

Some of the same types of program features might deprive students of their property right to an appropriate education. Suppose, for example, that low-achieving students of a certain age were simply denied high school graduation or a diploma without any further opportunity to improve their performance. Or suppose they were assigned to classes which were demonstrably custodial rather than instructional. In such cases, not only would a deprivation likely have been established but it would be more difficult to justify than deprivation of freedom from stigmatization.

In either case, however, the final issue would be whether deprivation of a liberty or property interest was based upon fair and reasonable procedures. In the context of minimum pupil performance programs, that would involve such matters as the validity of the assessment instruments used to determine whether pupils had met the performance standards, and perhaps the validity of the standards themselves, and the availability of a right to appeal the initial determination. The extent of the procedural protections required would be dependent upon the importance which

the court attaches to the student's interest. This will be especially true as to the "appeal" or "hearing" procedure by which students could challenge determinations that they are performing below standards. In student disciplinary cases, even a short-term suspension requires a rudimentary form of "hearing."* The U.S. Supreme Court indicated that more substantial disciplinary action, or special circumstances, might require a more formal hearing. However, just as the Supreme Court's sensitivity to racial or ethnic discrimination may be on the wane, so may its willingness to afford students procedural protection. In the recent corporal punishment case,** for example, the Court refused to require any due process procedural protections for students subjected to corporal punishment on the grounds that abuses of power by school authorities were relatively rare and that common law remedies were available for any such abuses.

Even assuming a court might be persuaded to require some due process procedural protections regarding the implementation of minimum pupil performance standards, the disciplinary cases provide relatively little guidance about the nature of the procedures which might be carried. In a disciplinary case, some

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*In Goss v. Lopez, supra, the U.S. Supreme Court required that "the student be given oral or written notice of the charges against him, and if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." 419 U.S. at 581. The Court was careful to note that such requirements were, "if anything, less than a fair minded principal would impose upon himself in order to avoid unfair suspensions." Id. at 583.

**Ingraham v. Wright, supra.

form of hearing might be appropriate, at least to determine what improper conduct the student was charged with, whether she or he had actually committed it, and whether she or he had been put on notice that it was improper. In a minimum standards case, most of the questions which might be at issue are likely to be different. Although there may be some question about the correctness of the scoring of the particular pupil's assessment test, the more common issues will go to the validity of the standards themselves and the instrument which assesses performance against those standards. The student may attempt to particularize those issues by reference to her or his special, individualized circumstances which render the standards or assessment instrument invalid. Yet inevitably the issues sought to be raised are broader. The complexities of test validity questions are such that an elaborate hearing would be required to deal adequately with them. The likelihood that a court would require such a hearing in connection with an individual student's petition is scant. Indeed, the more probable consequence is that the Court would be dissuaded from providing <u>any</u> due process procedural protections.

Even if the courts were willing to mandate due process procedural protections the utility of such hearings might not be great for many individual plaintiffs. This is because the hearing will involve a balancing of the student's interests against those of the state. Arguably, the state and the child share the same interest in providing the student with the most appropriate education, free of stigmatizing effects. In such

cases the hearing officer must determine which of the parties is best able to make this judgment. Deference to professional educators will have considerable weight.

The student will be in a stronger position regarding the denial of a diploma since both the interests and the relationship of the parties are different than in the promotion case. The student's interest can be defined as an interest in: (1) the educational, career and financial opportunities which are conditioned, in part, upon possession of this document; and (2) being free of the stigma of having performed "below par" academically. The state's interest is to protect the "value" of the diploma. By restricting the award of the diploma to those who meet certain standards the school guarantees that the diploma will in fact, represent those standards rather than "attendance." The state may also assert that it is protecting the property interest of successful candidates in the diploma's value. Since the pupil-teacher relationship has ended and the challenge is to the ultimate decision of the school authorities rather than to the educational process, the hearing can proceed more dispassionately in such cases.

Regardless of the impact that the due process hearing will have on the complaint of the individual plaintiff, there is another reason for requiring such protections. Even if educators ultimately do "know what's best for the student," the lack of due process protections means that judgment goes untested. On the other hand, the teacher or administrator who knows that her or his decisions are reviewable may be more likely to treat her or his students fairly.

State education clauses provide the final conceivable constitutional basis for attacking established pupil performance standards. The primary thrust of the argument would be that the particular minimum standards program is inconsistent with the constitutional mandate because it establishes too low a measure of acceptable pupil performance. For example, in a state required to ensure a "high quality" or "thorough and efficient" system of education to define as satisfactory or acceptable performance of high school graduates the equivalent of "5th-grade" skills in reading and mathematics could be attacked as manifestly inadequate. The difficulties in supporting this argument are two-fold: (1) state constitutional education clauses have acquired little specific meaning through the years;* and (2) judges are especially reluctant to supersede educators about matters regarded as going so directly to their professional expertise as acceptable levels of pupil performance. Even if a court were to find that the standards seemed to fall short of the constitutional expectation, the court might not strike down the standards because they move toward compliance.

The Peter W. case focused national attention upon common law negligence theories for holding a school system accountable for low-levels of pupil performance. Despite that case's lack of success in the courts, the theories it advanced still

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*To date no court has defined the specific level of pupil performance required to satisfy a state constitutional command.

warrant some discussion. It is not uncommon in the law for the proponents of a revolutionary theory to be rebuffed initially by the courts. In the context of an existing program of statewide minimum pupil performance standards, challengers would have particular difficulty in supporting arguments based upon common law negligence theories, however. Their primary thrust, as in the case of the education clause argument, would have to be either that the standards themselves were set so low as to constitute negligence or that the state's failure to assure an adequate response to evidence of unacceptably low pupil performance, as determined by the state's own standards, is negligent. As this paper has already suggested, the first of those arguments is unlikely to prevail. Since the state's education authorities had defined specific pupil performance standards, a judge would be extremely reluctant to strike down such action on a theory so general and so alien to these matters as common law negligence. The court wold have to find that the state owed a "duty of care" to pupils to set higher standards and that the breach of that duty caused harm to them. The only conceivable source of such a duty* would be a state education clause whose language required a "thorough and efficient" or "high quality" (or the equivalent) educational system. As indicated, proponents of this argument would have to overcome limitations in the historical interpretation of such clauses. Moreover, when the state

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*This would be a more difficult case than Peter W. where there had been a state-imposed standard of "eighth grade" reading level for high school graduation. The attorneys for Peter had argued that the defendants' negligence was defined in part by their failure to bring their client to that level.

constitutional "standard" was coupled with a negligence theory, the court would have to deal with the policy concerns which proved decisive in Peter W.

The prospects for a successful challenge are at least somewhat greater if the negligence theory is focused upon an inadequate educational response to evidence of poor pupil performance. But that would be a re-litigation of Peter W., where it was asserted unsuccessfully that the state performance standard defined the "duty of care" for negligence purposes.

In sum, therefore, challenges to established minimum pupil performance standard programs can proceed on a number of legal theories. The likelihoold of success is limited, however. The programs would be most vulnerable if they were established purely for punitive purposes, either to withhold promotion or graduation, or to simply identify pupils as "low achievers," rather than for diagnostic and remedial purposes.

2. Legal Challenges to the Absence of Statewide Minimum Pupil Performance Standards.

The question remains to be considered whether states are legally obligated to provide a diagnostic and remedial program through the use of statewide minimum pupil performance standards. A similar litany of legal theories will have to

be considered -- Federal and state equal protection and due process clauses, state education clauses, general statutory duties to assess pupil performance and to assure an effective educational system, and common law negligence.

Under the Federal Equal Protection Clause, there is some support for the proposition that students are entitled to minimum educational adequacy. In San Antonio Independent School District v. Rodriguez,* the Texas school finance case, the United States Supreme Court suggested that "some identifiable quantum of education" might be "a constitutionally protected prerequisite" to the exercise of the right to speak and to vote.** But the Court did not have to address that issue directly.

> Whatever merit appellees' argument might have if a state's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where -- as is true in the present case -- no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.***

This minimum entitlement approach to the Equal Protection Clause is reminiscent of the theory advanced by Professor Frank

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*411 U.S. 1 (1973).

**411 U.S. at 36.

***411 U.S. at 37.

Michelman in 1969.* He argued, in effect, that "society should provi whatever level of education is necessary for an individual to 'compete' effectively in society."**

More recently, a lower federal court quoted the above Supreme Court statement and concluded that, "It would thus appear not inconsistent with Rodriguez to hold that there exists a constitutional right to a certain minimum level of education as opposed to a constitutional right to a particular level of education."*** The district court also interpreted the Rodriguez case narrowly, to be read in its "peculiar factual setting" as standing for the proposition that "equal educational opportunity is not measured in terms of equal financial expenditures."**** The question before the district court, whether "equal educational opportunity, as a constitutional standard, should be defined to include equal access to minimal educational services,"***** therefore, had not been definitively answered by the Supreme Court.

Even if the Fialkowski court's interpretation of Rodriguez proves correct and there is a constitutional right to "minimum

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*Michelman, The Supreme Court, 1968 Term- Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7 (1969).

**Graham & Kravett The Evolution of Equal Protection - Education, Municipal Services and Wealth, 7 Harv. Civ. Rts. Civ. Lib. L. Rev. 103, 175 (1972).

***Fialkowski v. Shapp, 405 F. Supp. 946 958 (E.D. Pa. 1975). The case involved an assertion that state and local school officials were not providing appropriate education to retarded children in violation of the Equal Protection and Due Process clauses.

****405 F. Supp. at 958.

*****Id.

education," that does not necessarily require the imposition of minimum pupil performance standards. The concept of equal educational opportunity, in the sense of entitlement to a "minimum education," has not been clearly defined by courts or commentators. Indeed, as many as nine different definitions have been suggested by one commentator.* Only one, or perhaps two, of those definitions focus on pupil performance, or outcomes.** The others relate to educational inputs -- the tangible resources of school systems -- or at most to the opportunity to be exposed to or to have access to certain educational services.

Only the outcome definitions of a "minimum education" could possibly support the argument that minimum pupil performance standards are constitutionally required; yet the limited federal court references to minimum educational entitlement speak primarily in input or access terms. The Supreme Court majority in Rodriguez, despite references to an outcome goal -- participation in the political process, found that the Texas' Minimum Foundation Program's guarantee of minimum teacher salaries, specified pupil-teacher ratios and funds earmarked for textbooks and other expenses provided

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*See Lindquist & Wise, Developments in Education Litigation: Equal Protection, 5 J.L. & Ed. 1, 2 n.2 (1976).

**"Minimum attainment," asserting that students be guaranteed a specified level of achievement, and perhaps the "negative definition (i.e., equality is not different outcomes).

students with a constitutionally adequate opportunity to attain the necessary skills. It was opportunity to attain rather than attainment that was required. Similarly, in Fialkowski the court spoke of "equal access to minimal educational services,"* not particular levels of educational attainment. At the moment, therefore, it appears that the federal courts would opt for an input or, at most, opportunity standard and this is consistent with Supreme Court precedents in analogous fields. According to one commentator, "the Supreme Court has silently (or perhaps unconsciously) adopted an input standard in all of its decisions dealing with fundamental interests."**

One can, of course, quarrel with the correctness of this view. Since the ultimate constitutional goal is an outcome goal -- effective participation in the political process -- the nature and extent of education necessary to ensure that result can more directly be determined by the performance levels of pupils. Output measurement thus determines input requirements.

But even if this argument were to prevail, the ensuing focus on pupil outcomes would not necessarily dictate a system of statewide minimum pupil performance standards. For example, equal educational outcomes have been variously defined to include: (1) all pupils performing equally at the end of the educational process; (2) all pupils, upon completion of the educational process, performing in the same relationship to

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*405 F. Supp. at 958.

**Graham and Kravett, supra at 178.

their abilities as determined at the start of the educational process; and (3) all pupils realizing their educational "potential" regardless of the relationship among their respective abilities.* None of these approaches would be satisfied by a program of minimum performance standards in the basic skills. It is only if attainment of minimum proficiency to function in the political process is deemed to be the constitutional standard that such a program might be required by the Federal Equal Protection Clause.

Although essentially the same analysis would occur under most state equal protection clauses, the challengers of state inaction would be in a stronger position in those state courts which have deemed, or would deem, education a fundamental interest. In such situations, once the challengers had demonstrated unequal educational opportunity, in the form of either inadequate performance of some students in the basic skills, or of differential standards from district to district, the state would have to justify its inaction -- that is, the absence of statewide minimum performance standards -- by reference to a compelling state interest rather than merely a rational basis.

A due process challenge might be launched on the basis of the following theory: (1) that students cannot be compelled to attend an educational system which does not provide them with an appropriate education (or, alternatively, that they have a property interest in an appropriate education);

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*Graham & Kravett, supra at 174.

and (2) that the absence of statewide minimum performance standards effectively renders their education inadequate. The first aspect of this theory has been advanced in a number of cases. In the Fialkowski case, for example, the plaintiffs had analogized their due process claims to those successfully advanced in the cases involving the confinement of mentally-ill patients to hospitals* and of juveniles to reformatories.** The theory is that "confinement" (compulsory education) can be justified only by appropriate "care and treatment" (educational progress). The district court in Fialkowski held that, in view of its favorable reaction to plaintiffs' equal protection claim, it "need not presently consider the soundness of applying the due process clause to a school's failure to provide a minimally adequate education to its students."***

Those challenging the absence of statewide minimum pupil performance standards will have considerably more difficulty demonstrating that such standards are necessary to an appropriate education. Their strongest approach may be to stress the arbitrariness and irrationality of assessing student needs,

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*See, e.g., Donaldson v. O'Connor, 493 F.2d 507, 519-21 (5th Cir. 1974), vacated and remanded in part, 422 U.S. 563 (1975); Welsch v. Likins, 373 F. Supp. 487, 491-99 (D. Minn. 1974).

**See, e.g., Inmates of Boys Training School v. Affleck, 346 F. Supp. 1354, 1364-65 (D.R.I. 1972).

***405 F. Supp. at 959 n.10.

devising responsive curriculum, and assigning, promoting and graduating students absent a framework of uniform, expected minimum performance in the basic skills. However couched though, dealing with the merits of this contention will force the court into-an educational thicket which it would much prefer to avoid. Deference to professional expertise is likely to be the response to the challengers.

Under some state education clauses it can be argued that compliance with the constitutional mandate ultimately requires a measure of pupil performance. The New Jersey Supreme Court's original decision in Robinson v. Cahill* lends some support to that argument. There the court interpreted the "thorough and efficient" education clause to guarantee "that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market."** Logically, whether or not the requisite educational opportunity is being provided can best, or perhaps only, be determined based upon the way in which students actually perform as citizens and as competitors in the labor market. To the extent that minimum levels of performance in the basic skills are effective proxies for, or prerequisites to, successful functioning as citizens and as competitors in the labor market, such minimum performance levels may acquire constitutional

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*62 N.J. 473, 303 A.2d 273 (1973).

**62 N.J. at 515 , 303 A.2d at 295.

status.

The argument is similar to the one discussed under the Federal Equal Protection Clause and the problems, too, are similar. No court has yet held squarely that a state is constitutionally required to ensure that pupils meet, or are even tested against, statewide minimum pupil performance standards. The prospects of such a holding are perhaps better under a state education clause which contains an express quality standard than under an equal protection clause which, on its face at least, demands equality of treatment not minimum entitlement.

Some state education clauses may support a different argument for the imposition of statewide performance standards. As previously indicated, many clauses explicitly require, or have been construed to require, uniformity in the public education system. Such uniformity arguably may be violated if the state requires or permits local districts to establish their own differing performance standards. Suppose, for example, that in a particular state entitlement to compensatory education or to a high school diploma turned upon satisfaction of locally-established standards. Students in different districts who performed identically might be treated differently because of differing local performance standards. Although geographical uniformity of treatment is not generally regarded as a requirement of equal protection, it may be required by some of these education clauses, even despite the tendency in some states to exalt "home rule" in education.

In states with statutory provisions charging state officials with responsibility for implementing constitutional educational quality requirements, or supervising the public schools, it may be possible to construct an argument of a duty to utilize statewide pupil performance standards. Without such statewide standards, the argument would proceed, it is impossible to effectively supervise or evaluate the public schools. Indeed, some of the statutory provisions refer to assessment of pupil performance as at least one element of the state level supervision.* If the statutory language can fairly be read to mandate assessment of pupil performance, a court may be willing to force compliance. On the other hand, if the language seems clearly permissive, the court is unlikely to stretch as far as necessary to construe it as mandatory.

The final theory which might be advanced is common law negligence. Challengers would argue that the state owed students a "duty of care" to do everything that a reasonable state would do through its public education system to equip students to participate effectively in the political process and to compete in the labor market. The "reasonable state", according to the challengers, would establish and implement a program of statewide minimum pupil performance standards (as witness the action taken, or being planned, by most of the states). The failure of the state in question would demonstrate its lack of reasonable care.

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*See, e.g., N.J.S.A. 18A:4-24.

Plaintiffs would then have to show a causal connection between that breach of duty and an injury they had suffered. In effect, they would have to demonstrate that but for the state's failure to adopt minimum performance standards, the plaintiffs' performance in the basic skills would have been better. This, in turn, raises the factual issue of whether the imposition of performance standards in other states has led to improved performance. If it has, the plaintiffs' case will be demonstrably strengthened. If it has not, after an adequate opportunity to have an impact, the basic premises underlying statewide minimum pupil performance standards will have to be reconsidered.

Conclusion

The establishment and implementation of statewide minimum pupil performance standards in many states will affect the legal status of pupils, and perhaps of teachers and administrators. In our litigious society that will certainly result in resort to the courts as individuals feel themselves aggrieved by the application of the standards. Indeed, in some states rumors about impending lawsuits are already circulating. Even if the initial efforts to challenge the standards themselves or specific uses of them are unsuccessful, further litigation can be expected. The various legal theories outlined in this paper may be augmented by others, even more imaginative.

As this paper suggests, the tendency of the courts to defer to the expertise of professional educators, as well as more general judicial developments limiting law reform litigation, will

provide a first line of defense against all legal challenges. In some cases, this defense will be sufficient. But in other cases, because of the willingness of a particular judge to entertain a relatively novel theory or because of the vulnerabilities of a particular minimum standards program, the question of legality will be much more hotly contested. Of course, a program which is, in fact, designed to serve an invidious purpose is most vulnerable. The more likely sources of vulnerability, however, will be found in the tendency of programs to be punitive, in the sense of withholding diplomas, denying graduation or publicly identifying students as low-achievers, without embodying any diagnostic or remedial elements. Such programs deserve repudiation by the courts for they should have been rejected by the educational policy makers.